St. Anthony's Hardware Stores Ltd.
v.
Ranjit Kumar and another

COURT OF APPEAL
WIMALARATNE, P. AND VICTOR PERERA, J.
C. A. APPLICATION NO. 1461/78
JUNE 21, 1979

Termination of Employment of Workmen (Special Provisions) Act, No. 45 1971, sections 2, 6—Services of workman terminated for incompetence—Reinstatement and payment of back wages ordered by Commissioner of Labour—Jurisdiction to make such order—Is such termination one imposed as a punishment by way of disciplinary action.

Held

Termination of the services of a workman on the ground of inefficiency or incompetence is not termination " by reason of punishment imposed by way of disciplinary action " within the meaning of section 2 of the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971. Accordingly the Commissioner of Labour has jurisdiction to inquire into and make order under this Statute in such a case.

Cases referred to

(1) *Karmar v. Cornelius, (1885) 141 E. R. 94.*
(2) *Ramaswamy Aiyar v. Madras Times Printing & Publishing Co. Ltd., (1918) A.I.R., Madras 1257.*

APPLICATION for a Writ of Certiorari.

H. L. de Silva, with *F. Mustapha,* for the petitioner.
C. Ranganathan, Q.C., with *K. Thevarajah,* for the 1st respondent.
K. M. M. B. Kulatunga, Additional Solicitor General, with *C. Sithamparapillai,* State Counsel, for the 2nd respondent.

Cur. adv. vult

July 23, 1979.

WIMALARATNE, P.

The 1st respondent was appointed as Accountant of the petitioner company with effect from 9.2.76. The appointment was on probation for a period of six months. There is nothing to show that the probationary period was extended. On the contrary the 1st respondent was given an increase of salary of Rs. 300 per month from 1.8.76. On 28.4.78 the 1st respondent was informed by letter 2R1 that his services were no longer required by the petitioner and he was given one month's notice of termination of services. The reason given for the termination was that on the advice of their Bankers the petitioner had decided to appoint an Accountant well experienced in all spheres of import financement and who would be in a position to render prompt accounting data for Bank study. The letter also alleged that it was not possible for the 1st respondent to effectually control the proper book-keeping and accounting functions of the company. The 1st

respondent replied by his letter 2R2 dated 2.5.78, repudiating the charges of inefficiency regarding his work, and complained that the termination was illegal. The petitioner replied by 2R3 of 3.5.78 that it was their right to employ an Accountant "who is in a position to maintaining accounting up to date" and which he (1st respondent) "had not been in a position to do". The 1st respondent thereupon complained to the 2nd respondent, the Commissioner of Labour, by his letter 2R4 dated 25.5.78.

An employer's right to terminate a contract of service on non-disciplinary grounds has been removed from the area of an employer's control and discretion by the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971. The relevant sections are :—

"Section 2(1)—No employer shall terminate the scheduled employment of any workman without—

(*a*) the prior consent in writing of the workman ; or

(*b*) the prior written approval of the Commissioner.

Section 2(3)—For the purposes of this Act, the scheduled employment of any workman shall be deemed to be terminated by his employer if for any reason whatsoever, otherwise than by reason of a punishment imposed by way of disciplinary action, the services of such workman in such employment are terminated by his employer, and such termination shall be deemed to include non-employment of the workman in such employment by his employer, whether temporarily or permanently.

Section 5—Where an employer terminates the scheduled employment of a workman in contravention of the provisions of this Act, such termination shall be illegal, null and void, and accordingly shall be of no effect whatsoever."

Section 6 provides that where an employer terminates the employment of a workman in contravention of this Act, the Commissioner may order such employer to continue to employ the workman.

The 2nd respondent caused the 1st respondent's complaint, to be inquired into by an Assistant Commissioner. The inquiry was conducted in the presence of the parties and/or their Attorneys-at-Law on 9.9.78, and 9.10.78, and thereafter written submissions were entertained. The Commissioner made order by his letter 'E' dated 6.12.78, ordering the employer to continue to employ the 1st respondent from 18.12.78, and to pay him back wages and allowances.

By the present application the petitioner seeks to have that order of the Commissioner quashed on two grounds, namely,

(1) that the Commissioner had no jurisdiction to order reinstatement as the termination had been on disciplinary grounds, and

(2) that the Commissioner, in conducting the inquiry, has not complied with the principles of natural justice.

Expanding his argument on the first of the above grounds, learned Counsel for the petitioner submitted that the main reason for this piece of legislation was the need felt by the State to exercise a greater degree of control over non-disciplinary terminations in the wake of increasing unemployment in the country. Whilst it was intended to prohibit employers resorting to retrenchment and lay off in circumstances not warranting it, on such premises as lack of raw materials and so on, the Act was not intended to preclude termination on good grounds. Our task, however, is to give the words of the Statute their plain meaning. Section 2(3) is in very clear language.

By section 2 the Commissioner of Labour has been vested with jurisdiction to order reinstatement if the termination has been "otherwise than by reason of a punishment imposed by way of disciplinary action". Only termination by way of disciplinary action ousts the jurisdiction of the Commissioner. Retrenchment and lay off are not the only non-disciplinary grounds covered by the Act.

It is also important to note that to oust the Commissioner's jurisdiction the termination has had to be not only by way of disciplinary action, but also by reason of punishment imposed by way of disciplinary action. What then is meant by termination on disciplinary grounds? When an employee is guilty of misconduct then termination would be by way of punishment on disciplinary grounds. Insubordination, dishonesty, drunkenness whilst at work, malicious damage to employers' property are types of misconduct which readily come to mind. Negligence may sometimes amount to misconduct, depending on the gravity of the breach of the duty of care. But inefficiency and incompetence denote a person's inability to perform the work allotted to him, and it is difficult to see how they could be equated to misconduct for which punishment by way of disciplinary action may be imposed within the meaning of the Act.

Mr. de Silva contended that as incompetence means want of ability or lack of capacity to perform the task allotted to a workman, failure to provide the requisite skill is the breach of

an implied or express duty to provide that skill and is therefore a breach of an undertaking given at the time of his employment, and that this amounts to misconduct. He supported his argument by reference to a case where incompetence was equated to misconduct. The case is an old case, that of *Karmer v. Cornelius* decided in the Court of Common Pleas in the year 1858 (1). There the defendant had retained the plaintiff in his service in the capacity of a painter, and though the plaintiff had been always ready and willing to continue in the defendant's service, the defendant discharged him before the stipulated period. The jury found as a fact that the plaintiff was incompetent. Said Willes, J: "The failure to afford the requisite skill which had been expressly or impliedly promised, is a breach of legal duty, and therefore misconduct;" and quoting Lord Ellenborough in *Spain v. Arnott,* the learned Judge said "'The master is not bound to keep him on as a burthensome and useless servant to the end of the year.' And it appears to us that there is no material difference between a servant who will not, and a servant who cannot, perform the duty for which he was hired." at 99.

The above is, if I may say so with respect, an unexceptional exposition of the common law. It has been applied in a number of cases in actions for damages for wrongful dismissal, and from it has emerged the rule that where a person is employed who has not the requisite competency for the office, his dismissal before the stipulated term of service is not wrongful, and no action lies for damages therefor—see for example, *V. Ramaswami Aiyar v. Madras Times Printing & Publishing Co. Ltd.* (2). In actions for damages for wrongful dismissal Courts have no doubt equated incompetence to misconduct. But here we are dealing with a statute which has altered the common law, and in altering the common law Parliament has been careful to provide the employer with another remedy; I refer to section 2 (1) (*b*) where a workman's employment may be terminated with the prior written approval of the Commissioner of Labour. If a workman is incompetent it is always open to the employer to make an application to the Commissioner to terminate the employment of such workman on the ground of incompetence.

To hold that incompetence is a form of misconduct for which the services of workman could be terminated as a punishment by way of disciplinary action, would be to do violence to the very language of the statute, and to render the purpose for which the statute was enacted nugatory.

The second ground on which a writ is asked for is that the Commissioner failed to comply with the principles of natural justice. The record of the proceedings before the Commissioner clearly shows that Counsel for the employer was given every opportunity of placing evidence if he so desired, but that he was content on making submissions only.

For these reasons I would refuse this application with costs.

VICTOR PERERA, J.—I agree.

Application refused.